No. 13802

In the UNITED STATES COURT OF APPEALS for the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF TO INTERVENORS PEPIN AND PIOLI

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I. CONCERNING BRIEF OF INTERVENOR PEPIN

Additional Statement of Facts

Following the strike, Joseph A. Pepin returned to work to his former job as a timekeeper (R. 1784). Approximately one year later on October 28, 1949, he was laid off[1], his termination slip being marked

[1]Pepin was laid off, not discharged, as erroneously stated in several instances in Pepin's brief, see, e. g., pp. 4 and 5.

"laid off—reduction in working force" (R. 1784; Gen. C. Ex. 159). Pepin first indicated a desire for re-employment on June 13, 1950, when, pursuant to the terms of the collective bargaining agreement which became effective on May 22, 1950 (Resp. Ex. 57), he registered his availability for recall[2] (R. 1789, 3887). Pepin testified that he registered once more (R. 1789) (presumably three months thereafter), but he did not maintain his registration (R. 3887). At the time of the hearing, there were 21 individuals on layoff status from Job No. 4496, Pepin's job classification (R. 3886-3887).

Pepin's supervisor, Chief Timekeeper Morrell, testified that he had a surplus of timekeepers during the period when Pepin and approximately 10 or 12 other timekeepers (including Alfred Bass, a complainant, who was laid off October 21, 1949, and with respect to whom the complaint was dismissed by the Board (R. 168, 215)) were laid off (R. 2702, 2708). Morrell also testified that Pepin did not work the overtime at the beginning of the shift to Morrell's satisfaction, resulting in the withdrawal of this work in January, 1948 (R. 4441-4443, 2705-2706).

The Trial Examiner summarized his findings with respect to Pepin's layoff as follows:

"I credit the testimony of Lynn Morrell con-

[2]Such registration was required every three months in order to maintain seniority (R. 1789).

> cerning the layoff of Joseph Pepin. I also believe, as Morrell testified, that Pepin did not work the overtime at the beginning of his shift to Morrell's satisfaction. I find no unlawful discrimination in the layoff or failure to rehire" (R. 217).

The Examiner's findings were adopted by the Board and the complaint was dismissed with respect to Pepin (R. 270).

Layoff of Pepin Proper

The main thesis of Pepin's brief is that Morrell's testimony respecting Pepin's layoff is "not entitled to credence" (P. & P. Br. 4). Thus, this Court is asked to review and set aside the Trial Examiner's credibility finding which was accepted by the Board. It is well established that appellate courts do not normally undertake to resolve questions of credibility. *National Labor Relations Bd. v. Anderson,* 9 Cir., 206 F. 2d 409.

The extremely narrow standard of judicial review applicable to cases where the Board has accepted the Trial Examiner's findings based on the evaluation of oral testimony as reliable, as in this case, was summarized by the court in *National Labor Relations Bd. v. Dinion Coil Co.,* 2 Cir., 201 F. 2d 484, 490, as follows:

> "* * * we surely may not upset the Board *when it accepts a finding of an Examiner* which is grounded upon (a) his disbelief in an orally

> testifying witness' testimony because of the witness' demeanor or (b) the Examiner's evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible * * * or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony * * *." (Emphasis supplied)

Nothing in the record meets this standard.

In an effort to discredit Morrell's testimony as to Pepin's layoff, Pepin's counsel refers to the fact that Morrell's testimony as to Gerber's discharge was not credited by the Board, apparently relying on the fallacious principle "false in one, false in all"[3] (P. & P. Br. 4). Apart from the fact that the Board's failure to credit Morrell's testimony as to Gerber was, as we contend elsewhere,[4] erroneous, we submit that what the Board concluded in Gerber's case is irrelevant here. Counsel apparently overlooks[5] the fact that the Examiner *credited* Morrell in Gerber's case (R. 204), as he did in Pepin's case. The fact that the Board reversed the Examiner's crediting of Morrell in one case and not in the other cuts both ways. It is just as logical to urge that this disparity strengthens the force of Morrell's testimony as to Pepin as to urge the opposite.

---

[3]This "worthless" principle has "little or no place in modern jurisprudence." **Virginian Ry. Co. v. Armentrout,** 4 Cir., 166 F. 2d 400, 405; annotated 4 A. L. R. 2d 1064; 2 **Wigmore on Evidence** (2d Ed.), §1008, p. 449.

[4](Co. Br. 38-42).

[5]In his zeal to discredit Morrell, Pepin's counsel twice erroneously states that Morrell's testimony respecting Gerber's discharge was **discredited** by the Examiner (P. & P. Br. 5, 16).

The Examiner had the opportunity of observing Pepin on the witness stand and of judging the validity of Morrell's testimony to the effect that Pepin was difficult to deal with and was always doing only that amount of work which the rules called for and no more (R. 2706). Pepin's personality and demeanor may well have been the deciding factors in the Examiner's mind, which the words do not preserve, convincing him of the non-discriminatory selection of Pepin for layoff. In support of the demeanor evidence, see, for example, Pepin's testimony with reference to time cards that the number of times he punched in less than six minutes before shift was five (R. 4382) and the subsequent stipulation that the correct number was twelve (R. 4442). Note also the adroit refinement as to Company rules regarding gambling and playing cards (R. 4387-4388).

It is argued that other events involving Pepin, related in the record, occurred long before the strike and, therefore, that these could not be anything more than afterthoughts or attempts to rationalize the layoff. They do, however, enter into making a total picture culminating in the irritation Morrell found regarding Pepin's refusal to conform to the spirit of the six-minute pre-shift overtime work (R. 4443).

Regardless of whether or not the Court does re-

verse the Board with respect to Gerber's case, indisputably, where the Examiner and Board agree as to the credibility findings, there is nothing in this record which would justify this Court departing from its usual position that it will not normally resolve questions of credibility.

II. CONCERNING BRIEF OF INTERVENOR PIOLI

Additional Statement of Facts

Pioli on direct examination was asked:

> "Q. Now, did you happen to know what incidents led to your discharge for improper conduct as stated on this slip?
>
> "A. The immediate incident?
>
> "Q. Yes.
>
> "A. Well, it was profanity. I called Mr. Hyman a damned liar." (R. 504).

Later, on rebuttal, Pioli said:

> "Q. So the record may be clear, you admitted what?
>
> "A. I admitted I called Mr. Hyman a 'god damn liar'." (R. 4309).

Pioli was discharged November 11, 1948. On the following day, he filed a written statement in applying for unemployment compensation as follows:

> "He came at me like a bull in a china shop. His belligerent attitude caused me to hastily call him a liar. I then showed him my temporary assignment card to prove it." (R. 4320).

Further relating the sequence of events, Pioli testified that upon return to his shop 702 (R. 505) he learned from his squad leader that Hyman had been

checking on his whereabouts. At this moment Hyman was standing at the shop office "the bull pen" (R. 4322), a distance about 100 feet away. Pioli proceeded to this office and *opened* the conversation (R. 4322).

Hyman, Assistant Superintendent, testified that the morning of the Pioli incident he was asked by the general foreman of Pioli's shop to come up and take care of the shop for him. Within a few minutes he received a call from an assistant to the Department Superintendent who told him that Pioli was down in shop 102 "with a group of people around there, waving his arms, talking; apparently organizing" (R. 3359). Hyman then investigated, inquiring of Pioli's squad leader, Anderson, asking him what reason Pioli had for being down there, and Anderson replied he did not know. Thereupon, Hyman asked the clerk if anyone had given Pioli permission and was informed that Pioli had a "* * * pass to go to 102. So I dropped the matter" (R. 3359). When Pioli returned he learned from his squad leader, Anderson, that Hyman was "having quite a steam pressure, and that he was accusing me of having gone down into 102 for the purpose of organizing" (R. 505-506). Hyman was standing with his arms over the office rail when Pioli came

over and the conversation in question took place (R. 3359).

The Discharge was Proper

Counsel for Pioli accepts the Board's crediting of Pioli's version of the incident and asserts only that the conclusions of law are patently wrong. Taking the testimony of Pioli at face value, we have his frank admission that he grossly insulted Hyman. Pioli did not contend that the *charge* was false but that *Hyman* was a liar. This was personalized profanity directed to high level plant supervision.

Pioli was the aggressor who left his work station and walked a distance of 100 feet to open the conversation. Therefore, the Board is unquestionably right in finding that the situation was not "contrived" (R. 199, 270).[1] As it further appears Hyman had been advised by another supervisor that Pioli was out of his regular shop "apparently organizing," it was incumbent upon Hyman at least to investigate whether Pioli had permission to be away from his work station. Upon ascertaining that Pioli did have a pass, he dropped the matter. Here again, the observation that "Hyman's suspicion that Pioli was absent from his department on union

[1]The Board accepted the Examiner's findings and recommendations as to Pioli.

business, though mistaken, was not entirely unreasonable" (R. 199) is manifestly right.

Pioli's counsel endeavors to discount the profanity as the real reason by quoting from Hyman's testimony (P. & P. Br. 21). However, the immediately following sentence is,

> "However, to call a man a liar, I would have my fighting clothes on." (R. 3362).

In summary, we have a worker as the aggressor leaving his work station, proceeding to the shop office, confronting his supervisor by opening the conversation and, in the course thereof, calling him "a god-damned liar."

The mere fact that Pioli was a prominent union official does not constitute a license for the disrespectful conduct here involved. Even assuming the accusation concerning organizing on Company time (not a protected, concerted activity in this instance) was made by Hyman, nonetheless, it is apparent that Pioli was not intentionally provoked to create a cause for discharge. The insubordination is a valid non-discriminatory cause for discharge, and, upon the record considered as a whole, no other inference is possible.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions of intervenors Pepin and Pioli to set aside the Board's order should be denied and

the decision dismissing the complaint as to intervenors should be affirmed.

Respectfully submitted,

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